

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
HARRIS, ANTONE C,)	CAUSE NO. IP04-0091-CR-01-B/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
vs.)	IP 04-91-CR-01 B/F
)	
ANTONE C. HARRIS,)	
Defendant.)	

**ORDER DENYING DEFENDANT’S MOTION TO SUPPRESS EVIDENCE
ON REMAND**

This matter is currently before the Court following remand from the Seventh Circuit Court of Appeals. The Court of Appeals remanded this case following our denial of Defendant’s Motion to Suppress Evidence and Request for Franks Hearing (see Order of January 4, 2005 [Docket No. 42]), in order to allow Defendant, Antone C. Harris, “to challenge the veracity of the affidavit that police used to procure the search warrant” authorizing a search of his home, via an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). U.S. v. Harris, 464 F.3d 733, 735 (7th Cir. Sept. 27, 2006). The Court of Appeals held that, “[w]hen a criminal defendant makes a substantial preliminary showing that the warrant to search his property was procured by intentional or reckless misrepresentation in the warrant affidavit, and such statements were necessary to the finding of probable cause, the Fourth Amendment entitles the defendant to” such a hearing. Id. The Court of Appeals ruled that Harris had made such a showing and that he was thus entitled to a Franks hearing. We conducted this hearing on January 19, 2007 to receive evidence and hear argument on these matters. The Court, being duly advised in the premises, now concludes that the search warrant was not procured by intentional

or reckless misrepresentation in the accompanying affidavit and that probable cause existed for the search of Defendant's residence. The Court therefore DENIES Defendant's Motion to Suppress Evidence for the reasons detailed in this entry.

I. Factual Background and Procedural History

In March of 2004, an anonymous tipster reported to the Indianapolis Police Department's "dope hotline" that Antone Harris and his brother, Trent Harris, were selling crack cocaine from a residence at 2254 N. Goodlet Avenue. Detective Michael Forrest investigated the tip. On April 19, 2004, Detective Forrest submitted a warrant affidavit which described surveillance he had done on the residence and information he had gathered since March 29, 2004.

Detective Forrest's affidavit contained the following assertions:

- In the seventy-two (72) hours prior to the warrant request, a credible and reliable confidential informant ("CI") had contacted Detective Forrest and told him that while visiting the Goodlet residence during the seventy-two (72) hours prior to April 19, 2004, he saw Antone Harris and Trent Harris possessing cocaine for sale. The CI stated that Antone Harris and Trent Harris had told him that they lived at the home. The CI further stated that several guns were inside the home, and that both Harrises "always ke[pt] a firearm close" while inside.
- Detective Forrest had previously received an anonymous tip from the dope hotline that both Antone Harris and Trent Harris were selling crack from the residence.
- Detective Forrest had personally surveilled the Goodlet residence and had observed both Antone Harris and Trent Harris coming and going from the home.
- Detective Forrest had checked recent police reports for the Goodlet residence and found that an animal control report was made on April 2, 2004, in relation to dogs at the home. The animal control officer had spoken to Antone Harris at the home, and Harris had then listed his address as 2254 N. Goodlet Avenue.
- A criminal history check revealed that Antone Harris had a prior felony conviction for cocaine possession, and Trent Harris had three prior gun- and drug-

related convictions.¹

On April 19, 2004, based on Detective Forrest's affidavit, Judge Young of the Marion Superior Court issued a No Knock and Announce search warrant for 2254 N. Goodlet Avenue, authorizing a search for cocaine and drug contraband therein. On April 20, 2004, the police executed the warrant and seized guns, cocaine, and drug paraphernalia.

Defendant's Motion to Suppress and Request for Franks Hearing

Antone Harris was charged with one count of possession with intent to distribute over 50 grams of a cocaine-based mixture. On September 17, 2004, he filed a motion to suppress evidence seized in the search and requested a Franks hearing² to challenge the veracity of Detective Forrest's affidavit, as well as a motion for an *in camera* hearing to compel disclosure of the CI's identity. He challenged the credibility of Detective Forrest and the CI, alleging that the warrant affidavit contained materially false statements which were necessary to a probable cause finding. See Def.'s Mem. [Docket No. 29] at 3-4. In support, Defendant submitted an

¹ Forrest Aff. at 1.

² Franks v. Delaware, 438 U.S. 154 (1978), establishes the rule that: [W]here [a] defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56. The Seventh Circuit has held that this also applies to omissions in the affidavit. See U.S. v. Williams, 737 F.2d 594, 604 (7th Cir. 1984).

Put another way, in a "three-prong" formulation, a defendant is entitled to a Franks hearing if he makes a substantial preliminary showing that: (1) the warrant affidavit contained false statements or omissions; (2) these statements or omissions were made intentionally or recklessly; and (3) the omitted information was necessary to support the search warrant. See Shell v. United States, 448 F.3d 951 (7th Cir. 2006).

affidavit from an Indiana Department of Corrections official stating that Trent Harris had been incarcerated from March 26, 2004, through the date of the search. Thus, Defendant alleged, it would have been impossible for the CI or Detective Forrest to have seen Trent Harris at the residence as alleged in the warrant affidavit. Defendant also submitted an affidavit swearing he was not at the home during the time the CI claimed to have spoken with him there.

Detective Forrest's Supplemental Affidavit

On December 10, 2004, we ordered the government to file a supplemental affidavit from Detective Forrest detailing when his surveillance occurred, describing why he believed that a person he had seen with Antone Harris was Trent Harris, and accounting for these discrepancies. See Order Directing Supplemental Submissions [Docket No. 39]. On December 20, 2004, the government filed this additional affidavit [Docket No. 41].

In his supplemental affidavit, Detective Forrest averred that he had conducted sporadic surveillance at the Goodlet residence on at least six separate occasions in March 2004 and the first part of April 2004, though he could not attest to the exact dates or times of the surveillance. Supp. Aff. ¶3, p. 2 n. 1. He further testified as to his familiarity with Antone Harris and Trent Harris, and to his communications with the CI regarding the Harrises and the Goodlet residence. Id. ¶ 3, p. 2 n. 2.

Some of the information in the supplemental affidavit pertained to the CI's visit(s) to the Goodlet residence and conversation(s) with its occupants. The supplemental affidavit mentioned that "[o]n or about April 12, 2004, the confidential informant contacted [Detective Forrest], and advised that he had visited 2254 N. Goodlet Avenue, Indianapolis, Indiana" and had observed both Antone Harris and Trent Harris at the house, as well as crack cocaine. Id. ¶ 5. This was the

only explicit reference to the CI visiting the Goodlet residence in the supplemental affidavit. In addition, the affidavit stated that “[o]n or about April 18, 2004” – the day before Detective Forrest submitted his warrant affidavit to the magistrate – “[Detective Forrest] was contacted by the confidential informant who relayed that the controlled substance violations were ongoing at the 2254 N. Goodlet Avenue residence.” *Id.* ¶ 8. However, the affidavit did *not* explicitly state that the CI’s April 18, 2004 observations were based on another visit to the Goodlet residence or another conversation with the home’s residents.

Denial of Franks Hearing

On January 4, 2005, this court denied Harris’s motion to suppress and request for a Franks hearing [Docket No. 42]. Our analysis was based upon the information provided in the original warrant affidavit, in the affidavits provided by Antone Harris in support of his Motion to Suppress, *and* in Detective Forrest’s supplemental affidavit. We held that the original warrant affidavit contained three materially false or misleading statements and omissions, to wit: (1) it identified a man accompanying Antone Harris as Trent Harris, when this would have been impossible, as Trent Harris was incarcerated at the time; (2) it contained misleading and/or false information about the date of the CI’s conversations with Antone Harris and this other individual;³ and (3) it did not include the dates of the dope hotline tip or of Detective Forrest’s

³ With respect to this discrepancy, we noted that

[t]he warrant affidavit implies this conversation [among the CI, Antone Harris, and the man then believed to be Trent Harris] took place within 72 hours of April 19, 2004 (which would have been April 16 at the earliest); however, the supplemental Forrest affidavit implies this conversation took place on April 12, 2004, and that on April 18, 2004, the confidential information merely confirmed

(continued...)

surveillance. See Order at 6-7. This satisfied the first prong of the showing that a defendant must make in order to compel a Franks hearing.

Further, we held that these false statements and omissions suggested “an intentional design to create an incorrect or at least misleading impression that the evidence relied upon to obtain the warrant was more current than it actually was,” thus satisfying the second prong of the requisite showing. Id. at 8. We based this conclusion upon our impression that “[t]he totality of the warrant affidavit [wa]s written to create the erroneous impression that the investigation information was acquired either immediately prior to or contemporaneously with the preparation of the affidavit,” when, in fact, (we then concluded) the dope hotline tip was nearly a month old by the time the warrant was issued, Detective Forrest’s surveillance of the residence had occurred several weeks prior, and the CI’s visit to the home and conversation with Defendant had not taken place within the seventy-two hours prior to the presentation of the warrant affidavit, but instead had “occurred a week prior to the request for a search warrant,” as indicated in the supplemental affidavit.⁴ Id. at 7-8.

However, we denied Harris’s motion on the basis that the misstatements were not

³(...continued)

Antone Harris was continuing to sell narcotics at the Goodlet Avenue residence. The supplemental affidavit is disturbingly vague as to the information conveyed by the confidential informant in the April 18, 2004 conversation.

Order at 7 n. 3.

⁴ However, we also noted that we were “not quite so easily convinced” that the erroneous naming of Trent Harris was intentional or reckless, finding that it “was likely the result of an honest mistake.” Id. at 8.

material to the magistrate's finding of probable cause,⁵ because even when the false statements and omissions were disregarded, there was still sufficient evidence to establish probable cause for the issuance of the search warrant. Order at 9. We delineated six remaining facts we considered sufficient to create probable cause: (1) the "dope hotline" tip; (2) Detective Forrest's surveillance of the Goodlet Avenue home and observation of Antone Harris and a second man coming and going from the residence; (3) the CI's April 12, 2004 visit to the Goodlet Avenue home, his observation of cocaine there, and his conversation with Antone Harris and another man who confirmed that the narcotics were for sale; (4) the CI's confirmation on April 18, 2004 that there were continuing drug violations going on at the Goodlet home; (5) Antone Harris's prior drug conviction; and (6) the police reports which listed Antone Harris's residence as the Goodlet Avenue address. *Id.* at 9-10. Because we concluded that these facts constituted sufficient information to support a finding of probable cause, we declined to suppress the evidence seized in the search and denied Defendant's request for a Franks hearing..

In June 2005, Harris was convicted of the drug charge in a jury trial, and was subsequently sentenced to twenty years imprisonment and ten years of supervised release. Harris timely appealed the issue of whether our denial of a Franks hearing violated his Fourth Amendment right to freedom from unreasonable search.

Seventh Circuit Review

On appeal, the Seventh Circuit Court of Appeals reversed our prior order based on the

⁵ Our Order also denied Harris's motion for *in camera* hearing to disclose the CI's identity as moot. The Court of Appeals did not review this ruling. *See Harris*, 464 F.3d at 737 fn. 3.

fact that we determined the existence of probable cause based in part on information in the supplemental affidavit and without conducting a Franks hearing. The Court of Appeals stated that “[c]onsidering new information presented in the supplemental filing that supported a finding of probable cause was beyond the trial court’s analytical reach,” and that we should have restricted our analysis of the supplemental affidavit to “facts that did *not* support a finding of probable cause.” Harris, 464 F.3d at 739 (emphasis added). The Court of Appeals enumerated these facts as such:

- that the hotline tip was made nearly a month before the warrant was requested;
- that the exact dates of Detective Forrest’s surveillance were unknown; and
- that the CI’s discussion with Harris about buying cocaine occurred at least a week before the warrant request (not 72 hours before).

The Court of Appeals held that the supplemental affidavit “allow[ed] the government to bolster the magistrate’s probable cause determination through post-hoc filings” and did not allow Defendant the “opportunity to cross-examine an officer who has intentionally or recklessly made false statements to procure a search warrant.” Id. Thus, the Seventh Circuit declined to consider details in the supplemental affidavit that supported a finding of probable cause. Given our erroneous reliance on the supplemental affidavit as well as the Court of Appeals’ own analysis of the probable cause calculus in this case, the Seventh Circuit held that Harris had made “a substantial preliminary showing that the warrant to search his home was constitutionally infirm.” Id. at 740. Accordingly, having met his preliminary burden for a Franks hearing, the case was remanded to us for that purpose.

II. Findings and Conclusions Upon Remand

Evidence Introduced at Franks Hearing

At the Franks hearing conducted on January 19, 2007, the government called Detective Michael Forrest to testify regarding the events leading up to the issuance of the Goodlet Avenue search warrant and Defendant's counsel cross-examined Detective Forrest as to these events, as well.

Detective Forrest testified that he conducted surveillance on the Goodlet residence throughout March and April of 2004 on approximately six separate occasions for varying lengths of time,⁶ and that during the course of this surveillance he had observed Antone Harris and an individual he had then believed to be Trent Harris coming and going from the residence.⁷ Tr. p. 13 ln. 2 – p. 14 ln. 13. Detective Forrest further asserted that in stating he had seen Trent Harris at the Goodlet address, he did not intentionally mislead the court in his original warrant affidavit because he actually thought the person he had seen with Antone Harris was his brother, Trent Harris. Tr. p. 14 ln. 24 – p. 15 ln. 6. Detective Forrest confirmed that he ran criminal history checks on both Antone Harris and Trent Harris and determined that Antone Harris had a previous conviction for cocaine possession and that Trent Harris had three drug- and gun-related convictions. Tr. p. 19 ln. 6 – p. 20 ln. 7.

Detective Forrest also testified extensively regarding his communications with the

⁶ Detective Forrest testified that his surveillance varied as to times during the day, the length of time spent observing the house, and the distance from the home where he would be positioned. He testified that he would sometimes park on the street and watch the home with binoculars. He testified that on occasion he observed Antone Harris coming and going from the front entrance of the home, which was located approximately thirty to forty feet back from the street. Tr. p. 34 ln. 10 – p. 36 ln. 7.

⁷ Detective Forrest testified that he was familiar with Antone Harris dating back to 1994, but that he had seen Trent Harris only on “a couple of occasions” on the street, and had never conducted any investigation specifically relating to Trent Harris. Tr. p. 25 ln. 9 – p. 26 ln. 13.

confidential informant,⁸ stating that, on April 9, 2004, he was contacted (via telephone call) by the CI with regard to an unrelated case, during which conversation Detective Forrest asked the CI whether he was familiar with Antone Harris; the CI replied that he was. Tr. p. 15 lns. 7-15. The CI told Detective Forrest that he knew Antone Harris lived on Goodlet Avenue near a park, though he did not know the exact address.⁹ Tr. p. 15 lns. 16-24. The CI also stated that he was familiar with Trent Harris, but was not as familiar with Trent as he was with Antone. Tr. p. 27

⁸ At the Franks hearing, Detective Forrest testified as to the CI's reliability:

Q. [...] In the original warrant affidavit you described the informant as reliable because of information provided on prior occasions that led to I think three arrests and convictions. Do you recall stating that?

A. At least three arrests, three seizures of narcotics, and three convictions, yes.

Q. Prior to April of 2004 had the informant ever provided information to you that proved to be unreliable?

A. No.

Q. To your knowledge had the informant ever provided information to anyone else that proved to be unreliable?

A. Not to my knowledge, no.

[...]

Q. Was there any information that came to you in the course of these contacts [with the CI] that caused you to doubt or question the veracity of the confidential informant's information?

A. Not one bit of it, ma'am.

Tr. p. 23 ln. 21 – p. 24 ln. 7; p. 38 lns. 18-21.

⁹ Detective Forrest testified that the 2254 North Goodlet Avenue residence is “approximately a block away” from a park. Tr. p. 16 lns. 5-7.

Ins. 9-15; p. 17 Ins. 16-20. Detective Forrest asked the CI to find out “if anything was happening” at the residence, and the CI said he would “see what he could do.” Tr. p. 27 Ins. 16-23.

Detective Forrest testified that on April 12, 2004, the same CI contacted him by phone and told Detective Forrest that he had recently been at the residence at 2254 North Goodlet,¹⁰ had witnessed large amounts of crack cocaine and numerous guns inside the residence, that the Goodlet address was Antone Harris’s and Trent Harris’s “crib,” and that Antone Harris and Trent Harris “were slinging dope like 90 going north.” Tr. p. 16 Ins. 21-25; p. 28 Ins 1-7; p. 28 ln. 15 – p. 29 ln. 8.

Thereafter, on April 18, 2004, Detective Forrest received another phone call from the CI and was told that there was ongoing criminal activity at the Goodlet residence – specifically, that the CI had witnessed Antone Harris and Trent Harris continuing to sell crack cocaine out of the residence, and that there were still guns inside the residence. The CI knew these things from his visit to the residence that day – April 18, 2004. Detective Forrest regarded the additional information he received from the CI on April 18 to be “corroborative” of the information he had received from the CI on prior occasions. Tr. p. 20 ln. 16 – p. 21 ln. 13; p. 38 Ins. 4-17.

Detective Forrest explained during the hearing in response to questioning by the assistant U.S. attorney that he had not included all the information regarding all of his communications with the CI in the original search warrant affidavit:

Q. In the affidavit that you submitted in support of the search warrant, did you include all of the information that you had received from the

¹⁰ Detective Forrest testified that it is his understanding that the visit which the CI spoke to him about on April 12 had occurred on that same date (April 12). Tr. p. 28 Ins. 8-14.

informant dating back as of April 9, 2004?

A. No.

Q. What information did you include in the warrant affidavit that you submitted on April 19, 2004?

A. Just the information from April 18th.

Q. Why did you include the information from April 18, 2004 and not the information from April 12, 2004 and April 9, 2004?

A. I only included the information from April 18th because the other information was stale. The information that I had received on April 18th was the latest thing that I had on the activity that was taking place at the house and who was at the house. So that was the information I used to obtain the search warrant.¹¹

Legal Analysis

The Existence of Probable Cause

In its opinion, the Court of Appeals observed that its decision to remand this case to us for a Franks hearing was not a “complete victory” for Harris, but that he must, at the hearing, “demonstrate by a preponderance of the evidence that the search warrant must be voided and the fruits of the illegal search suppressed.” Id. at 739-40. The Supreme Court in the Franks case described what is now Harris’s burden, as follows:

In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 437 U.S. at 156. Applying the Court of Appeals’ directive that our determination as to

¹¹ Tr. p. 22 lns. 5-20.

probable cause must not be based on information supplied in the supplemental affidavit that would support such a finding in retrospect, we made clear at the Franks hearing, “The Court’s determinations as to the probable cause for the issuance of a warrant will turn on what was known *at the time the warrant was sought and issued*. . . . So whatever after-the-fact justifications there are would not be relevant.” Tr. p. 9 ln. 21 – p. 10 ln. 2 (emphasis added).

When an assertion of probable cause is based on a CI’s tip, probable cause is determined based on the totality of circumstances, including four factors:

- (1) the degree to which the informant has acquired knowledge of events through firsthand observation;
- (2) the amount of detail provided;
- (3) the interval between the date of the events and the police officer’s application for the search warrant;
- (4) the extent to which the police have corroborated the informant’s statements.

U.S. v. Koerth, 312 F.3d 862, 866 (7th Cir. 2002) (cited in Harris at 739). In its order of remand, the Court of Appeals recognized that “the whole may be more than the sum of its parts when assessing probable cause.” Harris, 464 F.3d at 740. See U.S. v. Olson, 408 F.3d 366, 372 (7th Cir. 2005) (“When assessed on an individual basis, each bit . . . may not provide much . . . [but] when viewed under the ‘totality-of-the-circumstances’ standard . . . altogether provide enough to establish probable cause.”). We therefore address each of these four factors in assessing the totality of the circumstances leading to our probable cause determination, combining the first two because of their interrelatedness:

- (1) *The degree to which the informant acquired knowledge of events through firsthand observation; and*
- (2) *The amount of detail provided.*

The original warrant affidavit prepared and submitted by Detective Forrest indicates that the CI acquired his knowledge of events firsthand which details he passed on to Detective

Forrest. He had personally visited the Goodlet Avenue residence and personally observed Antone Harris and another man whom he believed to be Trent Harris possessing cocaine and firearms inside the dwelling. He had spoken personally with both men and was told by them that the cocaine was for sale. He knew that they both lived at that residence. In our view, these are substantial details supplied by the CI.

The Seventh Circuit has previously observed in its opinion that “the first two factors weigh in the government’s favor because the CI’s information does include some indicia of firsthand knowledge and credible detail.” Harris, 464 F.3d at 739. No additional evidence obtained in the Franks hearing contravenes these facts. Thus, we share the appellate court’s view that factors (1) and (2) weigh in the government’s favor in terms of our determination of whether probable cause existed for issuance of the warrant.

(3) The interval between the date of the events and the police officer’s application for the search warrant.

In its opinion, the Court of Appeals believed, based on the evidence before it but without benefit of a Franks hearing, that this factor counseled against a finding of probable cause, reasoning that:

After excising the false statement that the CI’s visit to the home and subsequent conversation with Detective Forrest occurred within seventy-two hours of the warrant application, no temporal guidepost remains in the affidavit allowing us to determine whether the CI’s information was stale. Stated differently, all that we know from the warrant affidavit is that at some unspecified time the CI allegedly visited the home and observed crack for sale, and at some unspecified time thereafter the CI reported this information to Detective Forrest. Although the “[p]assage of time is less critical when the affidavit refers to facts that indicate ongoing criminal activity,” . . . after omitting its falsities, there is little left in Detective Forrest’s affidavit to suggest that there was ongoing criminal activity in the home.

Id. at 739-40 (internal citations omitted).

The Court of Appeals’s determination that there was no remaining “temporal guidepost” in the original affidavit accurately reflects this court’s initial interpretation of those events, as we set them forth in our order denying Defendant’s request for a Franks hearing. Our understanding at that time, based on the information before us, was this: Detective Forrest had stated in his warrant affidavit that the CI had visited the Goodlet residence, and spoken with Defendant there, within the seventy-two hours before the affidavit was filed – that is, between April 16, 2004 and April 19, 2004. Detective Forrest’s supplemental affidavit then stated that the CI had visited the residence and conversed with Defendant on April 12, 2004, and on April 18, 2004 he “confirmed” to Detective Forrest that unlawful activity was ongoing at the residence – but did not explicitly state that this April 18 confirmation was based on a previous, *second* visit to the Goodlet home. Thus, we understood that there had been only one visit to the Goodlet home – on April 12, 2004 – and the warrant affidavit was therefore false as to the timing of the visit and must be excised, which left the Court without a “temporal guidepost” as to the CI’s visit.

However, based on the more fully developed testimony adduced at the Franks hearing, it is now clear to us that our prior understanding of the sequence of contacts by the CI with the Goodlet address and Detective Forrest was inaccurate, due to the inaccurate and misleading assertions contained in the supplemental affidavit, which, rather than clarifying the timing of the CI’s contacts with Defendant, muddled the waters in this respect.¹² The evidence from the

¹² We note that government counsel has assumed responsibility for the obfuscation, as Assistant United States Attorney Cynthia Ridgeway stated at the Franks hearing:

In the supplemental affidavit, Your Honor, it is my responsibility to have included to make sure that the obscurity between the original warrant affidavit and the supplemental affidavit was not in existence, and I did not do that. . . . I should have stated or I should have asked Officer Forrest to state more clearly in that
(continued...)

hearing makes clear that the CI, in fact, visited the Goodlet Avenue residence and spoke with Defendant there on two separate occasions – on April 12, 2004, as noted in the supplemental affidavit, and again on April 18, 2004, obviously within the seventy-two-hour window described in the warrant affidavit.¹³ The “temporal guidepost” within the original warrant affidavit was, in fact, accurate, and was neither misleading nor false, as we originally characterized it to be. Accordingly, because the CI’s observations as to ongoing criminal activity were made within seventy-two hours of the warrant being issued, this information was not stale and weighs in favor of a determination that there was probable cause for the search.¹⁴

¹²(...continued)

[supplemental] affidavit everything that happened on April 18 as well, and I did not do that, and that’s my responsibility. That is not to say that Officer Forrest mislead [sic] or intentionally lied to Judge Young when he relayed in his original warrant affidavit that within 72 hours from that application on April 18 – I’m sorry, April 19th, 2004, that within 72 hours that informant had been in the residence and had observed what he had detailed in the original warrant affidavit.

Tr. p. 42 ln. 22 – p. 43 ln. 15.

¹³ Detective Forrest confirmed the veracity of the warrant affidavit on this point in his testimony at the hearing:

Q. Now the original warrant affidavit references that the confidential informant was at the residence within 72 hours of the date of your affidavit, correct?

A. Yes.

Q. You were referring to the April 18th visit?

A. Yes.

Tr. p. 31 ln. 21 – p. 32 ln. 1.

¹⁴ During the Franks hearing, Defendant’s counsel argued that we are precluded from reconsidering our prior findings as to the number of visits the CI made to the Goodlet home. Defense counsel argued that the “law of the case” doctrine prevents us from revisiting this
(continued...)

(4) *The extent to which the police have corroborated the informant's statements.*

The Seventh Circuit viewed the fourth factor also to counsel against a finding of probable cause for the search of the Goodlet Avenue residence, noting that anonymous tips generally do not carry much corroborative weight. See U.S. v. Olson, 408 F.3d 366, 371 (7th Cir. 2005) (corroborative weight of a tip is compromised if the affidavit does not indicate how police obtained tip information, whether the police knew the identity of the tipster, and the basis of the tipster's knowledge – each of which is the case here). In the view of the appellate court, the tip's credibility was further compromised because it identified both Trent Harris and “Anthony” Harris (not his real name, “Antone”) as persons engaging in illegal activity, which was clearly inaccurate with respect to Trent Harris, who was incarcerated at the time. Harris, 464 F.3d at 740.

The Court of Appeals noted that Detective Forrest's surveillance did not corroborate ongoing criminal activity, because the only statement in his affidavit concerning his surveillance was that he saw both Antone Harris and Trent Harris coming and going from the house. Clearly, Detective Forrest made the same error as did the CI in identifying Trent Harris as having been present at the Goodlet address, so Detective Forrest's surveillance is limited to the placement of

¹⁴(...continued)

factual issue, so that our prior rulings must stand as such. See Tr. p. 52 ln. 22 – p. 53 ln.12. However, as the Seventh Circuit held recently in Santamarina v. Sears, Roebuck & Co., 466 F.3d 570, 571-72 (7th Cir. Oct. 19, 2006), prior rulings in a case can be changed during the pendency of litigation if it becomes clear that those rulings were erroneously reached. Santamarina, 466 F.3d at 571-72 (“The authority of a district judge to reconsider a previous ruling in the same litigation . . . is governed by the doctrine of law of the case, which authorizes such reconsideration if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous.”). The remand here – to conduct a Franks hearing to allow for a full and fair opportunity for evidence to be adduced on the basis of which new and valid findings would be made – provides such a compelling reason.

Antone Harris coming and going from the home – which by itself was not necessarily indicative of illegal activity. Id.

In the Seventh Circuit’s view, the fact that Antone Harris had a prior drug-related felony conviction had *some* corroborative value, though as an isolated fact is not enough. See U.S. v. Peck, 317 F.3d 754, 757 (7th Cir. 2003) (“the police must do more than simply run a record check of the accused, because this alone does not corroborate a CI’s statements alleging that a search will uncover evidence of a crime”). On the basis of this analysis, the Court of Appeals concluded that, if the misrepresentations in the affidavit are severed, there was “little corroborative weight to the evidence remaining.” Harris, 464 F.3d at 740.

We note that, after reinstating the temporal guidepost in factor (3) as to the date of the CI’s conversation with Antone Harris at his home, the remaining misstatements or omissions in the original affidavit are minor, including: (1) that the man accompanying Antone Harris was misidentified as Trent Harris – an error we have previously declared to be “likely the result of an honest mistake,” due to both Detective Forrest’s and the CI’s lesser familiarity with Trent Harris (Order at 8); and (2) that Detective Forrest failed to include the dates of the dope hotline tip or his surveillance activities.

With due deference to the Court of Appeals regarding the corroborative value of each of these facts taken separately, in our judgment, when taken together, the facts corroborating the informant’s observations are entitled to at least *some* weight. Here “the whole [is] more than the sum of its parts when assessing probable cause,” (Harris, 464 F.3d at 740) and no evidence introduced during the Franks hearing contradicted or otherwise minimized the reliability of these facts, we conclude that the fourth factor also weighs in favor of a finding of probable cause.

Determination of Probable Cause

Our charge from the Court of Appeals on remand was to conduct a Franks hearing in order to allow Defendant the opportunity to “demonstrate by a preponderance of the evidence that the search warrant must be voided and the fruits of the illegal search suppressed.” Id. at 740-41. We now conclude, based on the totality of the circumstances which includes the four factors detailed above (each of which weighs, to varying degrees, on the side of a probable cause finding), that probable cause did exist for the search of the Goodlet Avenue residence on April 20, 2004, and Defendant has failed to prove by a preponderance of the evidence that the affidavit was insufficient to establish probable cause. In our initial effort to sort out perceived discrepancies in the warrant affidavit, we (in error) ordered the preparation of a supplemental affidavit, which regrettably only further clouded an understanding of the events that occurred here. Our subsequent error in analysis was compounded by the fact that we did not conduct a hearing at which these factual inconsistencies could be clarified. Having now had the benefit of such a hearing, at which a full development of all the relevant evidence occurred, we confidently conclude that probable cause did exist for the search of the residence here, the evidence obtained therein should not be suppressed, and no basis exists on which to declare the search warrant void. Accordingly, Defendant’s Motion to Suppress Evidence is DENIED.¹⁵ IT IS SO ORDERED.

¹⁵ In addition, we note that though Defendant did not renew his motion to compel disclosure of the CI’s identity, defense counsel indicated at the Franks hearing an intent to do so. Tr. p. 54 lns. 12-21. We note that none of the evidence introduced at the hearing leads us to doubt that the contacts between the CI and Defendant occurred, and that our finding of probable cause can be reached without knowing the identity of the CI.

Date: _____

Copies to:

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